



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
Southern California

BY U.S. MAIL AND EMAIL

February 28, 2019

U.S. Customs and Border Protection

FOIA Officer
90 K Street, NW
9th Floor, Mail Stop 1181
Washington, DC 20229
CBPFOIA@cbp.dhs.gov

Department of Homeland Security

Sam Kaplan
Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane SW
STOP-0655
Washington, D.C. 20528-0655
E-mail: foia@hq.dhs.gov

**Re: Request Under Freedom of Information Act
*Expedited Processing and Fee Waiver Requested***

Dear FOIA Officers:

I am a staff attorney at the American Civil Liberties Union Foundation of Southern California. I write on behalf of the American Civil Liberties Union of Southern California ("ACLU SoCal") to request records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 522 *et seq.*

I. Requestor

ACLU SoCal is a non-profit, nonpartisan organization under the laws of the state of California with over 120,000 members. As an affiliate of the national American Civil Liberties Union, ACLU SoCal is dedicated to the principles of liberty and equality embodied in both the United States and California constitutions and our nations' civil rights laws. ACLU SoCal is committed to principles of transparency and accountability and uses state and federal public records laws to ensure that the public is informed about the conduct of government officials. ACLU SoCal uses such records to compile information for publication in reports published in

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hard copy and distributed electronically through its website, in amicus briefs, in legislative and public advocacy efforts, and in litigation.

II. Request for Records

A. Documents requested

We seek disclosure of the following records¹ from January 1, 2017 through the date on which the search for responsive records is undertaken, which were prepared, received, transmitted, collected and/or maintained by the Department of Homeland Security (“DHS”) or U.S. Customs and Border Protection (“CBP”) and any of their sub-agencies or divisions:

1. A memorandum dated September 6, 2017 entitled “Guidance on the Acting Secretary’s Rescission of the Memorandum of June 15, 2012, Establishing DACA,” authored by Border Patrol Acting Chief Carla L. Provost, governing CBP’s authority to process and perform systems checks of beneficiaries of the Deferred Action for Childhood Arrivals (“DACA”) program.
2. A memorandum dated December 26, 2017 governing CBP’s searching of, screening of, or performance of criminal history checks on beneficiaries of the DACA program at U.S. airports (including but not limited to Valley International Airport in Harlingen, Texas), land ports of entry, or checkpoints.
3. Any other memoranda, policy, or guidance governing CBP’s searching of, screening of, or performance of criminal history checks on DACA beneficiaries at U.S. airports, land ports of entry, or checkpoints in the states of Texas and California.
4. Records mentioning or referring to CBP’s interpretation, enforcement, and implementation of any memoranda or guidance provided in response to Request Nos. 1–3, above.
5. Any communications between CBP officers or agents mentioning or referring to the interpretation, enforcement, and implementation of any memoranda or guidance provided in response to Request Nos. 1–3, above.

¹ The term “records” as used herein includes but is not limited to all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audio tapes, CDs, DVDs, floppy disks, zip disks, faxes, files, e-mails, notes (including handwritten notes), letters, summaries or records of personal conversations, reports and/or summaries of interviews, reports and/or summaries of investigations, guidelines, evaluations, instructions, analyses, memoranda, agreements, orders, prescriptions, charts, expressions of statements of policy, procedures, protocols, reports, rules, training manuals, or studies.

6. Any records evidencing the total number of DACA recipients detained at U.S. airports, land ports of entry, or checkpoints in the states of Texas and California for processing, security, or systems checks, pursuant to the authorities set forth in memoranda responsive to Request Nos. 1–3, above.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), we request that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, we request that responsive records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency’s possession, and that the records be provided in separate, Bates-numbered files.

B. Request for expedited processing

We seek expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E). There is a “compelling need” for these records, as defined in the statute, because the information requested is “urgen[tly]” needed by an organization primarily engaged in disseminating information “to inform the public about actual or alleged federal government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II).²

This Request implicates a matter of urgent public concern: security screenings and background checks performed on individuals who have been protected from removal proceedings through a federal deferred action program. Border screening procedures are critically important to individuals who frequently travel in and around border zones across the country, including in Texas, particularly since these screening procedures are likely to result in detentions, searches of personal items, and delays in travel. In particular, many beneficiaries of the DACA program live, work, or pass through border zones. CBP policies that result in lengthy screenings or unnecessary detentions of these beneficiaries greatly impact these individuals, and may frustrate the stated objectives of the federal DACA program.

This Request is made by ACLU SoCal, which is “primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(d)(1)(ii). *See American Civil*

² *See also Amer. Civil Liberties Union v. U.S. Dep’t of Defense*, 2006 WL 1469418 (N.D. Cal. 2006) (ordering expedited processing of a request for records under the FOIA statute where plaintiffs had alleged a compelling need to know about the Department of Defense’s practice of gathering information on political protests in the United States); *Washington Post v. Dep’t of Homeland Sec.*, 459 F. Supp. 2d 61, 66 (D.C.C. 2006) (holding that expedited processing of a request for information from the Secret Service about who visited Vice-President Cheney during CIA-leak investigation was proper under the statute where plaintiff had asserted “statutory entitlement to expedited review of the FOIA request, based on the statutory predicate that the plaintiff has a ‘compelling need’ for the information.”); *Elec. Privacy Info. Ctr. v. Dep’t of Justice*, 416 F. Supp. 2d 30 (D.D.C.2006) (granting a preliminary injunction and ordering expedited processing and disclosure of documents concerning the Bush Administration’s policy of conducting surveillance of domestic communications).

Liberties Union v. Dep't of Justice, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience,” is “primary engaged in disseminating information”). Dissemination of information to the public is a critical and substantial component of ACLU SoCal’s mission and work, which includes sharing of such information to public through newsletters, news briefings, “Know Your Rights” trainings, and other educational and informational materials. ACLU SoCal also disseminates information to individuals, tax-exempt organizations, not-for-profit groups, and members through its website, <http://www.aclu-sc.org>. ACLU SoCal’s website includes a section for news, along with links to information about current issues of public interest. The website also contains archives of press releases and other documents demonstrating the thorough extent to which the organization disseminates information to the public on numerous issues. *See* <https://www.aclusocal.org/en/press-releases> and <https://www.aclusocal.org/en/News>.

ACLU SoCal also shares information with the national ACLU office. The ACLU publishes information through multiple outlets including newsletters, action alerts, videos, and other media. The ACLU regularly publishes *STAND*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 900,000 people. The ACLU also publishes regular updates and alerts via email to over 3.1 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 4 million social media followers. The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests. The ACLU also publishes a widely read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. *See* <https://www.aclu.org.blog>. The ACLU creates and disseminates original editorial and educational content on civil rights and civil liberties news through multi-media projects, including videos, podcasts, and interactive features. *See* <https://www.aclu.org/multimedia>. The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, www.aclu.org. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. Through these pages, and with respect to each specific civil liberties issue, the ACLU provides the public with educational material, recent news, analyses of relevant congressional or executive branch action, government documents obtained through FOIA requests, and further in-depth analytic and educational multi-media features.

Based on the foregoing, this Request warrants expedited processing because the information sought relates to “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence.” 28 C.F.R. § 16.5(d)(1)(iv).

III. Application for Waiver or Limitation of Search and Review Fees

ACLU SoCal requests a waiver or limitation of document search, review, duplication, and other processing fees on the grounds that disclosure of the requested records is in the public interest and because disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of

the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). ACLU SoCal also requests a waiver of search fees on the grounds that it qualifies as “a representative of the news media. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

A. This Request is not made to further ACLU SoCal’s commercial interest.

The records sought by this Request are not for commercial use, and ACLU SoCal plans to disseminate the information disclosed through print and other media to the public at no cost, and through meetings with members and affected communities. *See* Part II.B, *supra* (describing ACLU SoCal’s mission to publish information concerning the government’s business). ACLU SoCal has both the intent and ability to convey any information obtained through this request to the public. Since the public interest fee waiver provision “is to be liberally construed in favor of waivers for noncommercial requesters,” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987), ACLU SoCal’s Request must be construed as falling within the organization’s non-commercial mission. *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.” (quotation marks omitted)).

B. This Request is likely to contribute significantly to public understanding of the operations or activities of the government.

ACLU SoCal requests a waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester”); *see also* 6 C.F.R. § 5.11(k).

Disclosure of the information sought in this Request is in the public interest and will contribute significantly to public understanding of the federal government’s security procedures and immigration enforcement protocols as applied to domestic travel. These issues are of intense public concern, as stated in Part II.B, *supra*. Border screening procedures are critically important to individuals who frequently travel in and around border zones across the country. The requested records relate directly to operations or activities of the government that potentially impact or infringe the rights of individuals to travel. For this reason, ACLU SoCal states “with reasonable specificity that its request pertains to operations of the government,” *Citizens for Responsibility and Ethics in Washington v. U.S. Dept. of Health and Human Services*, 481 F. Supp. 2d 99, 107 (D.D.C. 2006), since “the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of the government,” *id.* at 109. As a result, this Request qualifies for a waiver or a reduction of duplication and search costs under subsection 552(a)(4)(A)(iii).

C. ACLU SoCal is a representative of the news media and the records are not sought for commercial use.

As stated above, ACLU SoCal is a non-profit organization that intends to disseminate the information gathered by this request to the public at no cost, and as a result qualifies as a “representative of the news media.” The “term ‘a representative of the news media’ means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii). The statutory definition does not require that the requester is a member of the traditional media. As long as the requester meets the definition in any aspect of its work, it qualifies for limitation of fees under this section of the statute.

Accordingly, ACLU SoCal also qualifies as a “representative of the news media” under the statutory definition, because it gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) (non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). ACLU SoCal is therefore also entitled to a waiver or limitation of duplication and search costs under subsection 552(a)(4)(A)(ii).

IV. Conclusion

We look forward to your reply to the request for expedited processing within 10 calendar days, as required under 5 U.S.C. § 552(a)(6)(E)(ii)(I). Notwithstanding your decision on the matter of expedited processing, we look forward to your reply to the records request within 20 business days, as required under 5 U.S.C. § 552(a)(6)(A)(I). We reserve the right to appeal a decision to withhold any information, or to deny expedited processing or a waiver of fees.

If this Request is denied in whole or part, please justify all deletions by reference to specific FOIA exemptions. We expect you to release all segregable portions of otherwise exempt material. For example, we expect you to redact names of individuals for whom privacy waivers are not enclosed, if such redaction is required by the Privacy Act or other law, and release any otherwise disclosable records as redacted. We also expect that this request will be processed in accordance with the presumption of disclosure set forth in the President’s directive to federal agencies on January 26, 2009. Pres. Obama, Memo. for the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) (“The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.”).

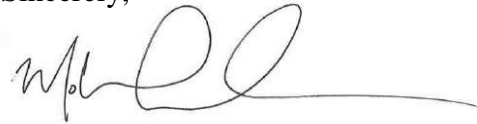
Please furnish records as soon as they are identified to the undersigned at:

Mohammad Tajsar
Staff Attorney
ACLU of Southern California
1313 W. 8th Street, Suite 200
Los Angeles, CA 90017

If you have questions, please contact Mohammad Tajsar, ACLU Foundation of Southern California, at 213.977.9500 x268, or via e-mail at mtajsar@aclusocal.org. Thank you in advance for your timely consideration of this request.

I certify that the information provided supporting the request for expedited processing is true and correct to the best of our knowledge and belief. Executed on the 28th of February, 2019.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Tajsar', followed by a long horizontal line.

Mohammad Tajsar
Staff Attorney
ACLU Foundation of Southern California